United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,174

CALVIN C. ANDERSON,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF COLUMBIA

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Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

Whether the conviction of appellant for violations of the narcotics laws was without due process where there was a three month delay between the alleged acts and bringing charges, and the prosecution's case consisted only of the testimony of an undercover policeman and the narcotics allegedly involved.

Whether it was error for the prosecuting attorney in his summation to the jury to argue that notes of the complaining witness which were not in evidence corroborated the witness' testimony.

Whether it was error for the Court below to define reasonable doubt in terms of evidence one would be willing to act upon in the more important affairs of his own life.

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UNITED STATES COURT OF APPEALS

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction by the United States District Court for the District of Columbia of violations of 21 U.S.C. §174, 26 U.S.C. §§4704(a), 4705(a). The Court below had jurisdiction under Title 11, Sec. 306 of the District of Columbia Code. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF CASE

On September 9, 1964 Private Carl W. Brooks of the Narcotic Squad of the Metropolitan Police appeared before United States Commissioner Wertleb and swore out a complaint against Appellant charging the unlawful possession and sale of heroin on June 2, 1964 (Complaint). Appellant was arrested shortly thereafter and subsequently indicted by the Grand Jury in six counts charging violations of 26 U.S.C. 4705 (a), 4704(a) and 21 U.S.C. 174 in that on two separate occasions, June 2 and 10, 1964, he sold to said Private Brooks six capsules containing heroin not in pursuance to a written order, not in or from the original stamped package and with the knowledge that the heroin had been imported into the United States contrary to law (Indictment).

Prior to trial Appellant through counsel moved for particulars with respect to the exact location and time of the alleged crimes and the names and addresses of those present (Motion for Bill of Particulars). The motion was withdrawn when the Government provided the requested information informally (Praecipe).

The case was reached for trial on December 15, 1964. Private Carl W. Brooks was the first witness for the prosecution. He testified that on June 2, 1964 at about 8:15 P.M.

he was on duty as a police officer working under cover and saw Appellant, whom he identified in open court, at the corner of 14th and U Streets, N. W. (Tr. 12-13). Private Brooks stated with particularity who was present at that time, quoted verbatim what he and Appellant said, and described in detail the negotiations for and purchase of six capsules containing white powder, including where people were standing and in what pocket the Appellant carried the capsules (Tr. 13-14).

Private Brooks also minutely described a subsequent meeting with Appellant on June 10, 1964 and the purchase of six more capsules of white powder, again providing details as to who was present, what was said (verbatim) and where Appellant carried the capsules (Tr. 19-20).

With respect to both purchases, the witness identified the capsules in court, testified they did not bear Federal tax-paid stamps, that he did not give Appellant a Treasury Department order form appropriate for the sale or transfer of narcotics, and that he kept the capsules in his possession until turning them over to Private Robert I. Bush.

On cross-examination Private Brooks stated that he had made certain notes and reports concerning the two incidents which were produced and marked for identification (Tr.23-24).

He estimated that during the period he was operating under cover he had made a hundred or so separate purchases of marcotics, but nonetheless was certain of his identification of Appellant (Tr. 26-27).

The Government's final two witnesses were Private Robert I. Bush of the Narcotics Squad, Metropolitan Police, and John A. Steele, an analytical chemist of the Internal Revenue Service. Private Bush identified the capsules and testified that he received them from Private Brooks and kept them in his possession until he turned them over to Mr. Steele (Tr. 30-33). Mr. Steele identified the capsules, stated that he received them from Private Bush and under analysis found them to contain heroin hydrochloride, a derivative of opium, a narcotic (Tr. 37-39). The capsules were admitted in evidence (Tr. 39) and the prosecution rested (Tr. 40).

Appellant was the only witness called for the defense. He denied the possession or sale of any narcotics and denied being in the area of 14th and U Streets, N. W., during the periods in question (Tr. 41-42).

In his closing address to the jury, the prosecutor endeavored to buttress the testimony of Private Brooks by arguing:

> You saw turned over to the defense counsel the various notes he had made at or about the time, showed the care with which he recorded his recollections. So you have these factors, strong and con-

vincing, on the question of identity that this indeed was the man that he made those purchases from (Tr. 46).

The jury after forty-seven minutes deliberation found Appellant guilty on all counts (Tr. 61), and on January 29, 1965 he received the following sentence: Five (5) years on each of the counts 1, 3, 4 and 6; said sentence under counts 1, 3, 4 and 6 to run concurrently with the sentence imposed in Criminal No. 791-64 and concurrently with each other; one (1) year to three (3) years on each of the counts 2 and 5; said sentence under counts 2 and 5 to run consecutively with the sentence imposed in Criminal 791-64 and concurrently with each other (Judgment and Commitment, Tr. 65).

STATEMENT OF POINTS

1. The conviction of Appellant of narcotics violations solely on the testimony of an undercover policeman who delayed three months after the alleged offenses before bringing charges is without due process of law.

2. The prosecutor's closing argument that notes written by the complainting witness which were not in evidence corroborated the witness' testimony was plain error requiring reversal.

3. The portion of the Trial Court's charge to the jury equating the concept of reasonable doubt to "not hesitating to act * * * in the more weighty and important matters relating to your personal affairs" was error.

SUMMARY OF ARGUMENT

Appellant's conviction of violations of narcotics laws was without due process of law. There was a three month delay between the alleged offenses and the bringing of charges, and the only evidence against appellant was the testimony of an undercover police officer and the narcotics allegedly involved. The police officer with the aid of notes to prepare his testimony related in detail two transactions covering a total of not more than fifteen minutes on different days six months prior to trial. Appellant denied any involvement, but of necessity in general terms, since he was without records and had not been promptly apprised of the charges against him. The Government's delay was deliberate, unreasonable under the circumstances and prejudicial to the defense. In addition, it was error for the prosecuting attorney to argue to the jury that the complaining witness' notes, which were not in evidence, corroborated his testimony. The Court below also erred in its charge to

the jury by defining proof beyond a reasonable doubt in terms of evidence one would be willing to act upon in the more weighty affairs of his own life.

ARGUMENT

[With respect to Point 1 Appellant desires the Court to read the following pages of the reporter's transcript 12-15, 18-20, 23-28, 41-42, all inclusive]

I. The conviction of Appellant of narcotics violations solely on the testimony of an undercover policeman who delayed three months after the alleged offenses before bringing charges is without due process of law.

Appellant was convicted on all six counts of an indictment charging the possession and sale of contraband narcotics on June 2 and June 10, 1964. The complaint against him was not sworn out until September 9, 1964. The complainant was a member of the Narcotic Squad of the Metropolitan Police who alleged he had purchased the drugs from Appellant. It is abundantly clear, therefore, that the complaint could have been brought in June or any time thereafter and the delay of three months was purposeful and deliberate.

After indictment and the appointment of counsel, Appellant was in a position and sought to learn by motion the particulars of the charges against him, which appear to have been provided informally by the U. S. Attorney on or about December 4, 1964.

This was eleven days prior to trial. The incidents complained of encompassed a total period of approximately fifteen minutes on two separate days six months earlier.

At trial Private Brooks, the complaint witness, testified in great detail with respect to the alleged offenses, relating who was present, what was said and by whom, in what pocket of his clothes the Appellant was carrying the capsules, and so on. While it does not appear from the record that Private Brooks referred to any notes during the course of his testimony, it is manifest that he could not have testified as he did without careful prior preparation from his notes, which he later produced upon request, because the memory of man, even that of a trained observer, simply is not that good. This is especially true in situations where the observer must differentiate between many similar incidents over an appreciable period, and Private Brooks admitted on cross-examination that during the time he was working under cover he had made a hundred or more purchases from persons professing to sell narcotics. There was no corroboration of Private Brooks' testimony other than the drugs asserted to have been purchased from Appellant.

That Appellant was prejudiced by the delay in bringing charges against him cannot be doubted. While he denied any participation, his testimony was of necessity in broad,

general terms since he did not have the benefit of notes of his day to day activities as did the sole voice raised against him. When first apprised of any charges, ninety or more days had gone by and it is safe to assume that the days in his existence do not lend themselves to ready differentiation. To reconstruct where one was during fifteen minutes of time on two given days is difficult at best. After the passage of three months it is formidable. The chances of one honestly but mistakenly accused being unable to demonstrate his innocence under the circumstances are very real. Although once charged, the Appellant was brought to trial with reasonable dispatch, he did not obtain the particulars of the Government's case until shortly before trial, which was six months after the events complained of. The record amply supports the fact that Appellant's defense was prejudiced by the delay.

Thus, the case at bar comes within the holding of Ross v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 17,877, decided June 30, 1965) where this Court found a narcotics conviction without due process under circumstances of a purposeful delay of seven months between offense and arrest, a plausible claim of prejudice and a trial in which the prosecution's case consisted of the recollection of one witness re-

freshed by a notebook. Mackey v. United States, ___ U.S.App. D.C. ___, ___ F.2d ___ (No. 18,525, decided June 30, 1965) is not to the contrary for there was an express finding of no prejudice in that case.

It is Appellant's position that the purposeful delay of three months by the prosecution in his case is unreasonable on its face inasmuch as he was known to the police and available for arrest, and, therefore, his conviction was without due process of law guaranteed by the Fifth Amendment and should be reversed.

[With respect to Point 2, Appellant desires the Court to read the following pages of the reporter's transcript: 23-25, 45-46, all inclusive.]

II. The prosecutor's closing argument that notes written by the complaining witness which were not in evidence corroborated the witness' testimony was plain error requiring reversal.

On his cross-examination of Private Brooks, Appellant's counsel requested the production of any contemporaneous reports or statements the witness might have made in connection with the two alleged sales of narcotics he had testified to. A narcotics case report and two sets of handwritten notes were produced in response to this request and were marked as Government's Exhibits Nos. 3, 4 and 5. Appellant's counsel

was given an opportunity to examine the report and notes and made no further reference to them; none were admitted into evidence.

In his closing argument to the jury, however, the prosecuting attorney said:

> You saw turned over to the defense counsel the various notes he (the complaining witness) had made at or about the time, showed the care with which he recorded his recollections. So you have these factors, strong and convincing, on the question of identity that this indeed was the man that he made those purchases from.

Argument exactly such as this, premised on matters not in evidence, and inadmissible on behalf of the prosecution in any event, was held to be error requiring a new trial in Johnson v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___, (No. 18,915, decided June 15, 1965). This Court there specifically struck down as improper an attempt by the prosecution to strengthen its case by reliance on inadmissible evidence. Said the Court at page 4 of the slip opinion:

> It is a well known rule of evidence, applicable in criminal and civil cases alike, that prior consistent statements may not be used to support one's own unimpeached witness. The Jencks Act gives the defendant the unqualified right to inspect prior statements of Government witnesses made to Government agents and relating to the subject matter of their testimony, but it does not abrogate this time-honored common law evidence rule. No one would seriously argue that the Government could formally introduce Jencks Act statements in support of its own unimpeached witness. Yet the comments of the prosecuting attorney in this case accomplish virtually the same result in the minds of the jurors. Based as they are on inadmissible evidence, such comments are not permissible. [Citations omitted]

By reason of the Government's prejudicial argument, Appellant is entitled to a new trial.

[With respect to Point 3, Appellant desires the Court to read page 52 of the reporter's transcript]

III. The portion of the Trial Court's charge to the jury equating the concept of reasonable doubt to "not hesitating to act * * * in the more weighty and important matters relating to your personal affairs" was error.

In a portion of his charge to the jury, the trial Judge said:

> But, if after impartial comparison and consideration of all the evidence and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt.

This Court in the case of Scurry v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 18,633, decided April 15, 1965) critized as not in accordance with law the definition of proof beyond a reasonable doubt in terms of evidence one would be willing to act upon in the more important affairs of his own life. At page 4 of the slip opinion the Court said:

> Being convinced beyond a reasonable doubt cannot be equated with being "willing to act * * * in the more weighty and important matters in your own affairs." A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary.

No objection to the charge was made below, but this Court may consider the matter as plain error [Rule 52(b), Fed. R. Crim. P.] especially when viewed in conjunction with Point II, supra, and reverse.

CONCLUSION

It is respectfully submitted that Appellant's conviction either should be set aside as having been obtained without due process of law or reversed with instructions to grant a new trial.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,174

CALVIN C. ANDERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
DAVID W. MILLER,
Assistant United States Attorneys.

Cr. No. 999-64

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Should appellant's conviction of selling narcotics be reversed and the indictment dismissed because three months passed between the offense and the issuance of an arrest warrant, where there is nothing in the record to show that the delay was purposeful or oppressive or that appellant was prejudiced by it, where no motion requesting such relief or alleging a denial of due process of law was made below, and where appellant denied the offenses in his trial testimony without complaining that his memory had failed because of passage of time?

2. Was it plain error for the trial court not to correct the prosecutor's argument to the jury that "the care with which" a witness "recorded his recollections" was a "factor" for the jury to consider in weighing the witness' credibility?

3. Was it plain error for the trial court to define a reasonable doubt as "such doubt as would cause you to hesitate to act in matters of importance to yourselves," and the absence of a reasonable doubt as "an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs"?

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 9, 1964, Private Carl W. Brooks of the Metropolitan Police Department swore to a complaint and arrest warrant charging appellant, Calvin C. Anderson, with illegally selling narcotics on June 2, 1964. Appellant was arrested and brought before the United States Commissioner on September 21, 1964. A preliminary hearing was held on October 8, 1964. Appellant was indicted on November 9, 1964. The indictment contained six counts charging appellant with violations of the Harrison and Jones-Miller acts (26 U.S.C. §§ 4704(a), 4705 (a); 21 U.S.C. § 174) on June 2 and 10, 1964. Found

guilty by a jury after a one-day trial on December 15, 1964, appellant was subsequently sentenced to five years concurrently on each of four counts and one to three years concurrently on each of two counts, the former sentences to be served concurrently and the latter consecutively with appellant's sentence upon another indictment, Crim. No. 791-64 (now on appeal to this Court at No. 19114). This appeal followed.

The testimony of Officer Brooks and the United States Chemist proved that on each of the dates alleged appellant sold untaxstamped heroin without a written order to Officer Brooks (Tr. 12-23, 34-39).

At the beginning of the cross-examination of Officer Brooks, appellant's trial counsel, in the presence of the jury, inquired whether Brooks had made "any contemporaneous reports or statements concerning any of these incidents." Upon receiving an affirmative reply, defense counsel—still in the presence of the jury—demanded and received for inspection a "narcotics case report" and Officer Brooks' handwritten notes dated June 2 and 10, 1964. Thereupon, a recess was taken for counsel to study these documents. (Tr. 23-24.) Afterwards, the cross-examination was resumed, but no reference was made to the report or notes (Tr. 25-29).

Appellant's entire defense consisted of his own testimony, in which he answered negatively, without elaboration, the following questions: "Did you on that occasion [June 2, 1964] make any sale of narcotics to Officer Bush [*sic*, Brooks]?" "Or have in possession the narcotics which have been described?" "[On] June 10th, 1964, did you on that occasion make any sale to Officer Brooks?" "Or have in your possession the narcotics which have been described?" On cross examination, appellant answered negatively, without elaboration, the following questions: "Do you live in that area?" "Did you come there for any reason?" "[O]n June 10th of 1964 were you in the area of Fourteenth and U Streets, Northwest, in the District?" "At any time have you been in that area, between the 2nd of June and the 10th of June,

1964?" He admitted prior convictions of carnal knowledge and petit larceny. (Tr. 41-43.)

Defense counsel made no objection to the prosecutor's closing argument, which summarized the evidence on which the prosecutor urged the jury to believe Officer Brooks' testimony and contained the following passage:

> "You saw turned over to the defense counsel the various notes he had made at or about the time, showed the care with which he recorded his recollections. So you have these factors, strong and convicing, on the question of identity that this indeed was the man that he made those purchases from." (Tr. 46.)

Defense counsel made no objection to the trial court's charge to the jury, which contained the following passage:

> "Every defendant in a criminal case is presumed to be innocent and this presumption of innocence attaches to a defendant throughout the trial. The burden is on the Government to prove the defendant guilty beyond a reasonable doubt; and if the Government fails to sustain this burden, then you must find the defendant not guilty.
>
> "You may well ask what is meant by the phrase 'a reasonable doubt.' It doesn't mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty and not necessarily proof to a mathematical certainty. A reasonable doubt is one which is reasonable in view of all the evidence. Therefore, if after impartial comparison and consideration of all the evidence, you can candidly say that you have such a doubt as would cause you to hesitate to act in matters of importance to yourselves, then you have a reasonable doubt.
>
> "But, if after impartial comparison and consideration of all the evidence and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your per-

sonal affairs, then you have no reasonable doubt." (Tr. 52.)

RULE INVOLVED

Rule 52, Federal Rules of Criminal Procedure provides:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

SUMMARY OF ARGUMENT

I.

Having failed to seek appropriate relief in the trial court, appellant has waived his contention that he was denied due process of law by the three months' delay that occurred between the date of the alleged offense and the date when the formal complaint against him was sworn. In any event, the contention is without merit in this case. Appellant, who was able to testify that he was not present in the vicinity of the crimes during the times when they were committed, cannot show any prejudice resulting from the delay. Moreover, it is not clear that the delay did not serve a legitimate law enforcement purpose. In these circumstances, a proper balance between appellant's constitutional interest in being informed of the charges against him at the earliest practicable time and society's interest in effective enforcement of the narcotics laws requires that appellant's conviction on this record be sustained.

II.

The prosecutor's argument about "the care with which" Officer Brooks "recorded his recollections" was a proper reference to the care which that officer had shown in conducting his investigation. It did not disclose the contents

of the officer's contemporaneous notes or suggest that the notes—produced under the Jencks Act but not received in evidence—corroborated the officer's testimony. If understood as a reference to the quality of the notes themselves, the argument was considered to be harmless by defense counsel below, who did not object, and should be so considered on this appeal.

III.

The trial court's definition of reasonable doubt in terms of hesitating to act and of the absence of reasonable doubt in terms of not hesitating to act did not, by word or implication, contain the disapproved concept of "willingness to act." In its parts and as a whole, the charge to the jury was correct.

ARGUMENT

I. The trial court did not plainly err in failing to dismiss the indictment because of three months' delay between the alleged offense and appellant's arrest, in the absence of a motion for such relief and evidence that prejudice had resulted from the delay

(Tr. 42)

Appellant contends that he was denied due process of law by being convicted after three months had elapsed between the date of the alleged offenses and the date when a formal complaint was sworn against him. The short answer to this contention is that appellant has waived it by failing to raise it at any time during the proceedings below. *United States* v. *Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958).

Even if this contention had been raised in such manner as to preserve it for appellate review, it would have to be rejected. The record does not show such a degree of prejudice resulting from purposeful delay and such a lack of compensating law enforcement advantage as appeared in *Ross* v. *United States*, D.C. Cir. No. 17877, decided June 30, 1965, on which appellant relies.

In *Ross*, the defendant testified that he could not remember anything about his activities at the time of the offense with which he was charged. As the Court pointed out, his failure of memory was plausible in view of the seven months' delay preceding his arrest and in view of the quality of his life, marked by limited education, no regular employment, and no other repetitive events to which he could refer in order to remember his activities during an earlier day. Slip op. p. 7. In the instant case, appellant displayed no failure of memory and established no facts from which it could be inferred that his memonic powers are subnormal. Having testified at trial that he was not in the vicinity of these crimes during the times when they were committed (Tr. 42), appellant cannot now claim a blank memory such as Ross experienced.[1] True, appellant's testimony was not detailed. However, his assertion on appeal (Br. 8-9) that his testimony was in general terms "of necessity" is not substantiated by the record. One may as well suppose that the generality of the questions and answers during his direct examination resulted from his lawyer's unwillingness to permit him either to perjure or to incriminate himself. See A.B.A. CANONS OF PROFESSIONAL ETHICS 15, 16, 29. The decisions of this Court since *Ross* clearly hold that purposeful delay between offense and arrest does not constitute a denial of due process of law unless it causes demonstrable prejudice resulting from a faded memory or inability to obtain witnesses. *Bey* v. *United States*, Nos. 18611, 18612, decided July 20, 1965; *Cannady* v. *United States*, No. 18392, decided July 14, 1965; see

[1] The Court may notice one memorable event in appellant's life that occurred a month after the offenses involved in the instant case and in the same vicinity. On July 12, 1964, appellant was arrested by an officer of No. 13 precinct for disorderly conduct arising out of a street fight. Search of his person revealed 351 capsules of heroin in his possession. At his trial for this offense, appellant admitted possession of the capsules. *Anderson* v. *United States*, D.C. Cir. No. 19114, transcript of pretrial hearing on motion to suppress, pp. 4-10, 14-17, 30-38; transcript of trial, pp. 3, 62-63.

Mackey v. *United States*, No. 18525, decided June 30, 1965.

Other facts distinguish the instant case from *Ross*. There it was shown that the undercover officer would not have been able to testify in any detail without refreshing his memory by notes. Slip op. pp. 3, 9. It was shown that the defendant had no means by which to refresh his recollection. Slip op. pp. 3, 7. It was conceded that the defendant was continuously available for arrest after the time of the offense. Slip op. p. 3. None of these facts affirmatively appears in the record of the instant case. Appellant perforce asks the Court to fill these gaps with speculation.

Finally, the *Ross* opinion emphasized that the seven months' delay in that case had served no legitimate law enforcement purpose. The undercover officer's work had been "marked by declining effectiveness" during the last few months preceding his emergence from cover and the issuance of complaints based on his investigations. Slip. op. pp. 4-5. In the instant case, there is no showing that Officer Brooks did not make new and fruitful contacts right up to the time when the warrant for appellant's arrest was issued. Thus, to sustain appellant's contention on this record would require complete sacrifice of the recognized "substantial public interest in effective police work to detect violations of the narcotics laws," a sacrifice which the advisedly balanced opinion in *Ross* does not countenance. Slip. op. pp. 3, 5-6.

Because appellant never sought relief in the trial court from any alleged prejudice resulting from delay in the institution of proceedings against him, and because the record is devoid of facts sufficient to bring this case within the holding of *Ross*, and any attempt by appellant to establish such facts now would require him to contradict his sworn testimony at the trial, it is submitted that appellant's due process argument should be rejected.

II. The trial court did not plainly err in failing to correct the prosecutor's argument that "the care with which" a witness "recorded his recollections" was a "factor" for the jury to consider

(Tr. 12-15, 19-20, 27-28, 41-42, 44-48)

Officer Brooks testified in detail about two illegal sales of narcotics and identified appellant as having made them (Tr. 12-15, 19-20, 27-28). Appellant responded with a bald denial that he had committed these offenses or been in the vicinity where they occurred (Tr. 41-42). Thus, Officer Brooks' opportunity and ability to observe the identity of the seller, to remember his observations, and to recount them accurately on the witness stand became the crucial facts for the jury to determine. With the issues so joined, the prosecutor argued, in summation, the facts tending to support Officer Brooks' identification of appellant: other occasions than the sales when Officer Brooks had seen appellant; the period of time during each sale that Officer Brooks and the seller were together; the lighting conditions on these occasions; the fact that Officer Brooks was not the chance victim of a sudden, violent crime, but was a trained police officer whose purpose at the time had been to observe; "the care with which" Officer Brooks "recorded his recollections." (Tr. 44-46.) Appellant's trial counsel did not object to this line of argument. On the contrary, he fought back on the same ground, citing other facts in support of the opposite conclusion (Tr. 47-48). On this appeal, however, appellant contends that the prosecutor's reference to "the care with which" Officer Brooks "recorded his recollections" was improper and requests a new trial on the authority of *(George E.) Johnson* v. *United States*, D.C. Cir. No. 18915, decided June 15, 1965.

The intended meaning of the prosecutor's words, spoken as part of a compound sentence whose grammatical struc-

ture is incomplete, can only be surmised.[2] On the one hand, they may have meant that Officer Brooks should be credited because he was a careful police officer, as shown by the fact that he took contemporaneous notes to record his recollections, Such an argument would be proper and not within the rationale of *Johnson*.[3] That this is what the prosecutor intended is suggested by the argument leading up to the now-challenged words. On the other hand, they may have meant that Officer Brooks should be credited because his contemporaneous notes were taken carefully. Such an argument, expressing an

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[2] By comparison with the challenged words herein, the purport of the prosecutor's argument in *Johnson* was unmistakable:

Johnson	***Instant case***
"Further corraboration, ladies and gentlemen, may be found in the fact that I produced for the benefit of this defense counsel statements in writing made to other persons by the police officer; and was there one satisfactory effort made to impeach the Officer to suggest that what he had made in his official report is in any way different from his testimony at trial? *There is no difference, ladies and gentlemen, in these reports made at the time of the crime. They corroborate the testimony of the police officer from the witness stand.*" Slip op. pp. 2-3. (Emphasis added by the Court.)	"You saw turned over to the defense counsel the various notes he made at or about the time, showed the care with which he recorded his recollections. So you have these factors, strong and convincing, on the question of identity that this indeed was the man that he made those purchases from." (Tr. 46.)

[3] It is permissible to show the circumstances which caused a witness to notice and remember the events about which he testifies. 58 Am. Jur., *Witnesses*, § 808 (1948). Thus, the fact that Officer Brooks made contemporaneous notes about appellant's sales was admissible and arguable without reference to the Jencks Act. Consequently, this Court's advice in *Johnson*, slip op. pp. 4-5, that Jencks Act statements should be demanded and produced out of the presence of the jury has no bearing here. If the trial court followed the wrong procedure in this regard, but see *Roberson* v. *United States*, 282 F.2d 648, 650-651 (6th Cir), *cert. denied*, 364 U.S. 879 (1960), the error was harmless. In any event, the trial court did not have the benefit of the *Johnson* opinion, which was filed six months after the trial herein.

opinion about the documents themselves, bears a specious resemblance to that disapproved in *Johnson*, which disclosed the material contents of Jencks Act statements not in evidence. However, the resemblence is only superficial. To say that notes were taken carefully is a long way from saying that the substance of those notes is the same as the witness' testimony and corroborates it. Whether Officer Brooks took his notes carefully or not has but slight bearing on his credibility as a witness describing his observations from memory. Thus, if the prosecutor was referring to the careful quality of the notes, as opposed to the careful quality of their maker, though the reference may have been technically impermissible, its impact on the jury, in view of Officer Brooks' strong testimony under oath, was harmless.

Only those who were present and heard the prosecutor's intonation of the now-challenged words could tell us precisely what he was talking about. If an event at trial cannot be characterized as erroneous on the official record made of the trial, the asserted error cannot be said to be "plain." If an objection had been interposed by appellant's trial counsel, we would at least be assured that the prosecutor's most critical listener considered the argument improper. Furthermore, the prosecutor would have been able to correct what may have been a slip of the tongue, and the trial court would have been able to disabuse the jury of any misapprehension. Appellant's belated exception to a few words of the prosecutor's summation can be sustained only by disparaging these corrective possibilities and declaring that trial objections are a pointless ritual.

III. The trial court correctly instructed the jury on reasonable doubt

(Tr. 52)

The trial court instructed the jury that a reasonable doubt is "such a doubt as would cause you to *hesitate to act* in matters of importance to yourselves." This instruction was correct. *Scurry* v. *United States*, D.C. Cir. No.

18633, decided April 15, 1965, slip op. p. 3. The trial court then went on to charge that if "you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would *not hesitate to act* upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt." (Tr. 52.) (Emphasis added.) Appellant equates the latter explanation with the definition of reasonable doubt negatively in terms of "willingness to act," which this Court disapproved in *Scurry* v. *United States*, *supra*, slip op. p. 4, and *Jones* v. *United States*, —— U.S. App. D.C. ——, 338 F.2d 553, 555 (1964). His equation is fallacious. The affirmative of hesitation and the negative of no hesitation are logically equivalent. Both in its parts and as a whole, the charge was correct. *McGill* v. *United States*, D.C. Cir. Nos. 18828, 18829, decided June 29, 1965, slip. op. pp. 9-14; *Moore* v. *United States*, —— U.S. App. D.C. ——, 345 F.2d 97, 98 n. 1 (1965) dictum).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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